STATE OF MICHIGAN
IN THE SUPREME COURT

In re REQUEST FOR ADVISORY OPINION REGARDING CONSTITUTIONALITY OF 2016 PA 249
_____/

Supreme Court No. 154085

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

BRIEF ON APPEAL OF ATTORNEY GENERAL BILL SCHUETTE IN SUPPORT OF THE VALIDITY OF 2016 PA 249

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

This Court has authority under article 3, § 8 of Michigan's 1963 Constitution to provide its opinion as to the constitutionality of the legislation at issue here, namely § 152b of 2016 PA 249. It has this authority because the Governor requested this Court's opinion on July 13, 2016, which is after § 152b was enacted (on June 27, 2016) and before § 152b's effective date (on October 1, 2016). Further, while 21 specifically identified provisions of 2016 PA 249 took immediate effect on June 27, *see* 2016 PA 249, enacting § 3(2) (listing sections that would "take effect upon enactment of this amendatory act"), § 152b is not included in that listing and therefore did not take effect on June 27. *See* 2016 PA 249, enacting § 3(1) ("Except as otherwise provided in subsection (2), this amendatory act takes effect October 1, 2016.").

STATEMENT OF QUESTIONS PRESENTED

1. Whether the Court should exercise its discretion to grant the Governor's request to issue an advisory opinion in this matter.

   The Attorney General's answer: Yes.

2. Whether the appropriation to nonpublic schools authorized by Section 152b of 2016 PA 249 would violate article 8, § 2 of Michigan's 1963 Constitution.

   The Attorney General's answer: No.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article 8, § 2 of Michigan's 1963 Constitution

Sec. 2. The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law. Every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color or national origin.

Nonpublic schools, prohibited aid.

No public monies or property shall be appropriated or paid or any public credit utilized, by the legislature or any other political subdivision or agency of the state directly or indirectly to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school. No payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school or at any location or institution where instruction is offered in whole or in part to such nonpublic school students. The legislature may provide for the transportation of students to and from any school.

MCL 388.1752b

Sec. 152b. (1) From the general fund money appropriated under section 11 [MCL 388.1611], there is allocated an amount not to exceed $2,500,000.00 for 2016-2017 to reimburse costs incurred by nonpublic schools as identified in the nonpublic school mandate report published by the department on November 25, 2014 and under subsection (2).

(2) By January 1, 2017, the department shall publish a form containing the requirements identified in the report under subsection (1). The department shall include other requirements on the form that were enacted into law after publication of the report. The form shall be posted on the department's website in electronic form.

(3) By June 15, 2017, a nonpublic school seeking reimbursement under subsection (1) of costs incurred during the 2016-2017 school year shall submit the form described in subsection (2) to the department. This section does not require a nonpublic school to submit a form described in subsection (2). A nonpublic school is not eligible for reimbursement under this section unless the nonpublic school submits the form described in subsection (2) in a timely manner.

(4) By August 15, 2017, the department shall distribute funds to nonpublic schools that submit a completed form described under subsection (2) in a timely manner. The superintendent shall determine the amount of funds to be paid to each nonpublic school in an amount that does not exceed the nonpublic school's actual cost to comply with requirements under subsections (1) and (2). The superintendent shall calculate a nonpublic school's actual cost in accordance with this section.

(5) If the funds allocated under this section are insufficient to fully fund payments as otherwise calculated under this section, the department shall distribute funds under this section on a prorated or other equitable basis as determined by the superintendent.

(6) The department has the authority to review the records of a nonpublic school submitting a form described in subsection (2) only for the limited purpose of verifying the nonpublic school's compliance with this section. If a nonpublic school does not allow the department to review records under this subsection for this limited purpose, the nonpublic school is not eligible for reimbursement under this section.

(7) The funds appropriated under this section are for purposes related to education, are considered to be incidental to the operation of a nonpublic school, are noninstructional in character, and are intended for the public purpose of ensuring the health, safety, and welfare of the children in nonpublic schools and to reimburse nonpublic schools for costs described in this section.

(8) Funds allocated under this section are not intended to aid or maintain any nonpublic school, support the attendance of any student at a nonpublic school, employ any person at a nonpublic school, support the attendance of any student at any location where instruction is offered to a nonpublic school student, or support the employment of any person at any location where instruction is offered to a nonpublic school student.

(9) For purposes of this section, "actual cost" means the hourly wage for the employee or employees performing the reported task or tasks and is to be calculated in accordance with the form published by the department under subsection (2), which shall include a detailed itemization of cost. The nonpublic school shall not charge more than the hourly wage of its lowest-paid employee capable of performing the reported task regardless of whether that individual is available and regardless of who actually performs the reported task. Labor costs under this subsection shall be estimated and charged in increments of

15 minutes or more, with all partial time increments rounded down. When calculating costs under subsection (4), fee components shall be itemized in a manner that expresses both the hourly wage and the number of hours charged. The nonpublic school may not charge any applicable labor charge amount to cover or partially cover the cost of health or fringe benefits. A nonpublic school shall not charge any overtime wages in the calculation of labor costs.

INTRODUCTION

Michigan's Legislature has adopted many health and safety measures designed to protect *all* school children in Michigan, regardless of whether they attend a public school or a nonpublic one. Having imposed equal burdens on all Michigan schools, out of equal concern for these children, the Legislature has now acted, in § 152b, to defray those costs on an evenhanded basis. Because those costs do not fund instruction, tuition, or teacher's salaries, and are all state-imposed costs in the first place, Michigan's Constitution does not forbid this equal treatment.

Michigan's Constitution bars the use of public funds that would, "directly or indirectly," "aid or maintain" nonpublic schools. Const 1963, art 8, § 2, ¶ 2. But this prohibition is not as broad as it might first appear. As this Court held 45 years ago, this prohibition applies to funding the educational services that a school provides, not to funding that supports health, safety, or non-instructional measures. For example, it would *directly* aid a nonpublic school if Michigan State Police officers responded to a 911 call reporting that an active shooter was harming children at a private school, yet no one would read the funding prohibition in article 8, § 2 to prevent the publicly funded state police from responding. Nor would article 8, § 2 prevent publicly funded fire departments from responding to a fire at a nonpublic school, or public mail from being delivered, or public water service from reaching a school. Rather, this Court has consistently and correctly recognized that § 2's prohibition is focused on instruction—on whether the funding aids instruction and teaching at a nonpublic school—and does not apply to incidental services.

That focus resolves this case, as the mandated measures at issue relate to health, safety, and administrative issues, not to paying for instruction, tuition, or teacher salaries. And funding health, safety, and general welfare measures at private schools also makes sense in light of the combined facts that education is compulsory, MCL 380.1561, and that the U.S. Constitution protects the right to choose a nonpublic school, *Pierce v Society of Sisters*, 268 US 510, 534–535 (1925). Further, when the costs arise from government-imposed mandates in the first place, rather than from the ordinary costs encountered in the economy, it is far from clear that the average citizen who voted to ratify § 2 would have called defraying those government-imposed costs "aid." If the government imposes a burden on its citizens, and then removes that burden, is that government "aid"?

This Court should grant the Governor's request for an advisory opinion. This case is the type of important public issue the people intended to cover when they authorized advisory opinions, as the question presented is an important question of law that will ultimately need to be resolved by this Court.

STATEMENT OF FACTS AND PROCEEDINGS

Section 152b's reimbursement provisions

In § 152b of 2016 PA 249 (now codified as MCL 388.1752b), the Legislature allocated up to $2.5 million for 2016 to 2017 to reimburse nonpublic schools for costs the schools incurred as a result of state mandates. Section 152b specified which costs could be recouped: those costs "incurred by nonpublic schools as identified in the nonpublic school mandate report published by the department on November 25,

2014." MCL 388.1752b(1). The mandate report (included here as Attachment A) identifies six categories of mandates that the Legislature has imposed on nonpublic schools: (1) student/staff safety, (2) building safety, (3) student health, (4) school operations, (5) accountability, and (6) educational requirements. Mandate Report, pp 2–3.

As these categories suggest, many of the mandates (18 of the 44 listed) relate to the safety of students and teachers. For example, in the category of student/staff safety, nonpublic schools in Michigan must conduct fire and tornado drills, MCL 29.19, must ensure their school buses meet or exceed federal motor vehicle safety standards, MCL 257.1810(1), must conduct criminal history checks before hiring new employees, MCL 380.1230(1), must satisfy safety standards for playground equipment, MCL 408.684, and must provide material safety data sheets for hazardous chemicals to employees who ask for them, MCL 29.5p(2). Similarly, in the building-safety category, nonpublic schools must meet federal standards relating to asbestos, MCL 388.863, and must meet construction standards such as using fire-resisting materials, MCL 388.851.

Five of the identified mandates cover health issues. For example, nonpublic schools must verify that children have been immunized before allowing them to attend the school, MCL 333.9208(2), must report to the Department of Community Health on the immunization status of each student, MCL 380.1177(3), must notify a student's teachers if aware the student has an inhaler or epinephrine auto-injector, MCL 380.1179(5), and must report on the vision of each child entering

kindergarten, MCL 380.1177(3). Combined, these health and safety mandates account for 23 of the 44 mandates.

Nine of the identified mandates impose requirements on how schools perform the administrative tasks that are part of running a school. For example, in the school-operations category, nonpublic schools must track compensatory time off for school employees and must pay employees on request for that time, MCL 408.414a(d) & (e), must keep student work permits on file, MCL 409.14(1), must provide employees, on request, with copies of their personnel files, MCL 425.504, and must employ a food safety manager, Mich Admin Code, R 289.570.2; MCL 289.1107(p); & MCL 289.2129. And in the accountability category, nonpublic schools must, for example, meet privacy requirements for certain information in student records, MCL 380.1135(5), and report to the local school superintendent with enrollment information, MCL 380.1578.

The remaining mandates (12 of the 44) relate to educational requirements. For example, nonpublic schools must meet teacher certification standards, MCL 388.553 & MCL 380.1233, must inform students about the postsecondary enrollment options act, notify qualifying students of their eligibility under the act, and provide counseling to eligible students about the act, MCL 388.514, .519, & .520, must take similar steps under the career and technical preparation act, MCL 388.1904, .1909, & .1910, and must use English as the basic language of instruction, MCL 380.1151. Nonpublic schools must also notify their school district if they will

need auxiliary services, such as health exams or street crossing guard service, Mich Admin Code, R 340.293.

Of these 12 educational requirements (and thus of the 44 mandates listed in the mandate report), only one relates to the content of a class. Specifically, MCL 380.1166 requires nonpublic schools to give regular courses of instruction "in the constitution of the United States, in the constitution of Michigan, and in the history and present form of government of the United States, Michigan, and its political subdivisions." That statute also requires high schools to require "a 1-semester course of study of 5 periods per week in civics which shall include the form and functions of the federal, state, and local governments and shall stress the rights and responsibilities of citizens." *Id.*

Section 152b implements its reimbursement process for these mandate categories by directing the Department of Education to create a form that nonpublic schools can fill out to seek reimbursement. Further, § 152b limits the reimbursement funds to "the nonpublic school's actual cost to comply" with the covered mandates. MCL 388.1752b(4). The statute also states the Legislature's intent that the allocated funds "are for purposes related to education," "are considered to be incidental to the operation of a nonpublic school," "are noninstructional in character," and "are intended for the public purpose of ensuring the health, safety, and welfare of children in nonpublic schools." MCL 388.1752b(7).

Nonpublic schools in Michigan

According to the Michigan Department of Education's Center for Educational Performance and Information (commonly known as CEPI), 686 nonpublic schools serve over 113,000 students in Michigan. *See* CEPI, *School Year 2014–15 Nonpublic School Data*, http://www.michigan.gov/documents/cepi/15-CEPI-06_NonPublics_496243_7.xlsx (accessed Aug. 18, 2016). Of these, 595 identify as religious schools (about 87%), with the remaining 91 (about 13%) identifying as secular schools. *Id.*

STANDARD OF REVIEW

"The constitutionality of a statute is a question of law that is reviewed de novo." *Phillips v Mirac, Inc*, 470 Mich 415, 422 (2004) (quotation marks omitted). Further, "[s]tatutes are presumed constitutional." *Id.*

ARGUMENT

I. The Court should issue an advisory opinion to resolve this important question of law that will soon affect thousands of Michigan families.

Although Chief Justice John Jay famously refused President George Washington's request for an advisory opinion out of separation-of-powers concerns, *Campbell-Ewald Co v Gomez*, 136 S Ct 663, 678 (2016) (Roberts, CJ, dissenting), Michigan's citizens rejected that bright-line division among the branches of Michigan government. Instead, the people of Michigan expressly included the option for an advisory opinion in our system of government by placing article 3, § 8 in Michigan's 1963 Constitution. Section 8 thus embodies the people's judgment

that sometimes it is in the best interests of the State and its citizens to have "important questions of law" about "the constitutionality of legislation" resolved by this Court in an expedited manner. Const 1963, art 3, § 8.

This case falls squarely into that category. It involves a question of significant public interest that affects not only the more than 113,000 Michigan children who attend nonpublic schools, but also their families and their communities. It involves important questions about the meaning of § 2 of article 8 of Michigan's Constitution, and in particular whether § 2 prevents Michigan's Legislature from funding services and measures that will protect the health and safety of children in Michigan regardless of what particular type of school they might happen to attend. And the question presented is well suited for immediate review by this Court because it presents a pure question of law about the proper interpretation of the text of § 2.

Further, as explained in the statement of jurisdiction in this brief, § 152b is legislation that fits article 3, § 8's requirements for an advisory opinion, because while some parts of 2016 PA 249 were given immediate effect, § 152b was not one of them. The law that the Governor signed states that § 152b's effective date is October 16, 2016, so the Governor's request was made before § 152b takes effect.

Because of the importance of this question to the people of Michigan, and of the likelihood that § 152b will be challenged once it takes effect, *see* Letter from Gov. Snyder to C.J. Young, p 2 (July 13, 2016) (Attachment B), this Court should

grant the Governor's request and provide its opinion on the constitutionality of MCL 388.1752b.

II. Section 152b does not violate article 8, § 2 of Michigan's Constitution because § 152b provides funding for general health and safety measures, not for instruction.

The Governor's request for an advisory opinion and this Court's order each raise a single question: whether the appropriation to nonpublic schools authorized by § 152b of 2016 PA 249 would violate § 2 of article 8 of Michigan's 1963 Constitution. Letter from Gov. Snyder to C.J. Young (July 13, 2016); Order, *In re Request for Advisory Op re Constitutionality of 2016 PA 249* (July 20, 2016). That question is therefore the only question before the Court. *In re Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich 41, 53 (1975) (limiting the scope of advisory opinions to the particularized claims actually raised in the Governor's request).

This question hinges primarily on the meaning of article 8, § 2. To determine that meaning, this Court " 'seek[s] the 'common understanding' of the people at the time the constitution was ratified," which is identified "by applying the plain meaning of the text at the time of ratification." *UAW v Green*, 498 Mich 282, 287 (2015), quoting *Goldstone v Bloomfield Twp Pub Library*, 479 Mich 554, 558–559 (2007). The goal is to apply the interpretation that "reasonable minds, the great mass of the people themselves, would give it." *Adair v Michigan*, 497 Mich 89 (2014) (quotation marks omitted).

Further, "[i]nterpretation of a constitutional provision also takes account of 'the circumstances leading to the adoption of the provision and the purpose sought to be accomplished.' " *UAW*, 498 Mich at 287, quoting *People v Tanner*, 496 Mich 199, 226 (2014).

A. The plain language of article 8, § 2 does not prohibit funding directed at health and safety or at auxiliary measures incidental to instruction.

The text of § 2 of article 8 uses broad language to prohibit the use of public funds to aid or maintain nonpublic schools: "No public monies or property shall be appropriated or paid or any public credit utilized, by the legislature or any other political subdivision or agency of the state directly or indirectly to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school." Const 1963, art 8, § 2, ¶ 2. This text does not specify *to* whom the money may not be paid; it merely says *by* whom it may not be paid ("by the legislature or any other political subdivision or agency of the state") and the purpose for which it may not be paid ("to aid or maintain" any nonpublic school). *Id.* The fact that the paragraph does not list funding recipients (such as schools or parents) is part of its breadth, giving effect to the prohibition against providing aid "indirectly." Section 2's text continues by listing specific types of prohibited funding ("[n]o payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property") and by clarifying what that funding may not be provided for ("directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school . . .").

Id. (The language omitted by the ellipsis was severed as unconstitutional in *Traverse City Sch Dist v Attorney General*, 384 Mich 390, 436 (1971).) But § 2 does allow the Legislature to "provide for the transportation of students to and from any school."

If the words "directly," "indirectly," "aid," "maintain," and "support" are viewed in isolation, apart from their context, it could be argued that no money or benefits of any kind may be used to aid, maintain, or support any activity involving a nonpublic school. The verbs "aid," "maintain," and "support" are, after all, broad terms. The verb "aid" means "to help" or "to give support, help, or succor to"; the verb "maintain" means "to hold or keep in any particular state or condition," "to support, sustain, or uphold," "to keep up," and "to bear the expense of"; and the verb "support" means "to uphold (one) by aid or countenance" and "to pay the costs of." *Webster's New International Dictionary* (2d ed 1955). And the adverb "indirectly" further suggests a broad reach for § 2's prohibition, as it means "not directly," as in "in an indirect, roundabout, or subtle manner." *Id.*

These words are broad enough to prohibit types of government support for nonpublic schools that it is hard to conceive anyone would object to, and even harder to believe that the great mass of the people intended to forbid. To return to the earlier example, suppose the Michigan State Police responded to a call about an active shooter at a nonpublic school. Surely a response by the MSP would fit within the plain language of § 2: the MSP is an entity to which "public monies" are "paid," and its response would certainly "aid" (i.e., help or give support to) that nonpublic

school and the children who attend it. Const 1963, art 8, § 2 (emphasis added). Similarly, if a fire department that received any public funding responded to a call that a nonpublic school had caught on fire, that emergency response too would "aid" the nonpublic school. Indeed, adopting such a broad reading would ban everyday services like mail delivery, public water hookups, public sewer hookups, public lighting along the sidewalk, and repairs to public roads that lead to the school entrance or parking lot.

Fortunately, faithful adherence to the Constitution's text does not require adopting the broadest possible reading. Instead, this Court's "obligation is to give the words of our Constitution a *reasonable* interpretation consistent with the plain meaning understood by the ratifiers." *Co Rd Ass'n of Michigan v Governor*, 474 Mich 11, 17 (2005) (emphasis added). And sometimes the reasonable interpretation is the narrower one. This Court, for example, recognized when interpreting a no-fault-insurance provision, that the word "care," if "taken in isolation," "can be broadly construed to encompass *anything* that is reasonably necessary to the provision of a person's protection or charge." *Griffith ex rel Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 533 (2005). But because context did not support that broad interpretation, this Court adopted a narrower one. *Id.* at 534. Similarly, the U.S. Supreme Court adopted a narrowing construction when confronted with equally broad language—the words "relate to" in the preemption provision of Employee Retirement Income Security Act of 1974 (ERISA). As the Supreme Court explained, ERISA's broad language did not need to "be read to extend to the

furthest stretch of its indeterminacy, [or] for all practical purposes preemption would never run its course, for [r]eally, universally, relations stop nowhere." *De Buono v NYSA-ILA Med & Clinical Servs Fund*, 520 US 806, 813 (1997) (internal quotation marks omitted); see also *California Div of Labor Standards Enf't v Dillingham Const, NA, Inc*, 519 US 316, 335 (1997) (Scalia, J, concurring) ("[A]pplying the 'relate to' provision according to its terms was a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else."). Like the concept of "relate to," the concept of what "aid[s]" a school, directly or even indirectly, is also one that stops nowhere.

Section 2's text itself identifies the appropriate limiting principle: aid to schools is aid that supports "education" and "instruction." When interpreting § 2, one cannot lose sight of the simple fact that it is about schools (a word it uses six times). The larger context confirms this simple point: the title of article 8 of our Constitution is "Education." And the feature that distinguishes schools from other institutions is the function they serve: a school is "an institution for teaching children." *Webster's New International Dictionary* (2d ed 1955). Section 2 itself emphasizes that schools exist to "provide for the education" of their pupils, Const 1963, art 8, § 2, ¶ 1, and the prohibition for funds to private schools accordingly addresses support for "the attendance of any student" or "the employment of any person," *id.* at ¶ 2. The people further focused on actual teaching, rather than on incidental matters, by using the word "instruction" in paragraph 2. And even though the word "instruction" appeared in a clause that was declared

unconstitutional because it caused an equal-protection problem, the word still shows that the intent of the ratifiers was to focus on instruction. Again, this makes sense, because the purpose of schools is to provide instruction—that is why they exist. Const 1963, art 8, § 1 ("Religion, morality and knowledge being necessary to good government and the happiness of mankind, *schools and the means of education* shall forever be encouraged.") (emphasis added).

Not only must "aid" relate to education and instruction, but also the common usage of the word "aid" cuts against considering the reduction of a government-imposed cost to count as "aid" at all. The costs being defrayed here are not costs that private schools encounter as a market-based cost of doing business, like paying for desks, paying teachers, or buying textbooks for their students. No, these are costs that exist specifically because the government has imposed them as a piece of the overarching structure that makes education compulsory, MCL 380.1561, yet recognizes the parents' constitutional right to choose a nonpublic school for the education of their children, *Pierce*, 268 US at 534–535 (addressing a due-process argument relating both to religious schools run by the Society of Sisters and to a secular military academy). And while the government has imposed these costs for good reason, all the government does in defraying these costs is return the schools to the position they would have already been in had the government not imposed the mandate. It is a bit like a big brother pushing his little brother down, and then, when helping him back up, demanding the little brother thank him for "aiding" him.

The fact that § 2 expressly gives the Legislature permission to "provide for the transportation of students to and from any school" does not indicate that transportation is the only type of aid that is permissible. For one, if that negative inference were drawn, that would return the Court to the unreasonable interpretation that § 2 prohibits any sort of aid whatsoever, including emergency services by fire and police departments, public water services, public sewer services, and road repair. That cannot be right.

For another, this Court has recognized for more than a century and a half that rules of statutory construction, like the *expressio unius* canon (that listing one thing implies excluding others), may not apply to the construction of the state constitution. *Williams v Mayor, etc, of City of Detroit*, 2 Mich 560, 563 (1853) ("That . . . there are some instruments or laws to which such maxims cannot be strictly applied, without doing manifest violence to the plain intent of the framers of the law, is also a matter of common experience. This is especially true in the construction of State constitutions . . . ."); *City of Ecorse v Peoples Cmty Hosp Auth*, 336 Mich 490, 502 (1953) (same). And even apart from these precedents, the *expressio unius* canon does not apply with much force here, because § 2's prohibition is a broad rule, not a specific enumeration. *See* Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 108 ("The more specific the enumeration, the greater the force of the canon."); *see also id.* at 107 ("Virtually all of the authorities who discuss the negative-implication canon

emphasize that it must be applied with great caution, since its application depends so much on context.").

Rather, the specific caveat regarding transportation likely exists because of the history preceding the enactment of paragraph 2 of § 2. As this Court noted in *Traverse City School District v Attorney General*, "[b]us transportation, a form of auxiliary services, goes back over thirty years, to 1939, with only two years interruption," 384 Mich 390, 407 n 2 (1971). Further, the people had expressly prohibited discrimination "as to religion" in the specific context of education, Const 1963, art 8, § 1, and there was legitimate concern that denying busing to children attending a religious school would violate constitutional protections concerning the freedom of religion. E.g., OAG, 1963–64, No 4177, p 192 (August 19, 1963), http://www.ag.state.mi.us/ opinion/datafiles/1960s/op03047.pdf (concluding that "school bus transportation is a public welfare benefit" under *Everson v Board of Education*, 330 US 1 (1947), and that "to bar transportation of children in attendance at church-related, nonpublic schools" might, in light of *Sherbert v Verner*, 374 US 398 (1963), "conflict with the Free Exercise Clause"). So it is not surprising that the drafters of § 2's second paragraph wanted to make clear that the state would continue to directly aid schools by providing busing. Further, busing is simultaneously the type of service that a local school district is uniquely equipped to provide and that is uniquely important, as it offers students access to their chosen school, see *Pierce*, 268 US at 534–535, in order to obtain an education that is compulsory, MCL 380.1561.

In sum, § 2's plain language focuses on preventing the Legislature from subsidizing parochial instruction from funds in the State Treasury, not on preventing nonpublic schools from receiving the ordinary, ancillary services and protections afforded to every other school in the state.

B. This Court has already adopted a reasonable interpretation of § 2 that focuses on educational services.

This Court has already recognized the risks of reading § 2's broad words to the fullest extent of their indeterminacy and accordingly has already adopted limiting principles based on the context and purpose of the amendment. In *Traverse City School District*, this Court considered the second paragraph of § 2, which had been passed just months before by referendum. 384 Mich at 404. In this decision contemporaneous with the amendment's ratification, the Court applied the "rule of 'common understanding,' " i.e., that the text's interpretation " 'is that which reasonable minds, the great mass of the people themselves, would give it.' " *Id.* at 405. Applying this rule, this Court held that "[t]he language of this amendment, read in the light of the circumstances leading up to and surrounding its adoption, and the common understanding of the words used, prohibits the purchase, with public funds, *of educational services* from a nonpublic school." *Id.* at 406–407 (footnote omitted) (emphasis added). In short, the Court focused on the key word in § 2—"school"—and on what makes a school a school—the education and instruction it provides.

In contrast to "educational services," this Court in *Traverse City School District* recognized that § 2 does *not* prohibit what a statute called "auxiliary services" and what this Court recognized as "[f]unctionally" being "general health and safety measures." *Id.* at 417–418. The services at issue in the case included "*health and nursing services and examinations*; *street crossing guards services*; national defense education act testing services; *speech correction services*; visiting teacher services for delinquent and disturbed children; school diagnostician services for all mentally handicapped children; teacher counsellor services for physically handicapped children; teacher consultant services for mentally handicapped or emotionally disturbed children; [and] remedial reading . . . ." *Id.* at 417–418 (emphasis added). They thus included some of the same services addressed by § 152b: reimbursement for costs relating to auxiliary services, such as health exams or street crossing guard service under Michigan Administrative Rule 340.293, or vision-screening reporting under MCL 380.1177(3), licensing requirements for school speech pathologists under MCL 333.17609, or other health measures, like immunizations under MCL 333.9028.

Furthermore, the reasoning in *Traverse City School District* concerning auxiliary services extends to *all* of the items on the mandate report under five of the six categories listed and defined in that report: (1) student/staff safety, (2) building safety, (3) student health, (4) school operations, and (5) accountability. The first three categories expressly focus on student health and safety and thus fall easily within the "general health and welfare measures" this Court concluded were not

affected by § 2. *Traverse City School District*, 384 Mich at 419. And the school-operations and accountability items also involve safety issues like food safety, material data safety sheets for hazardous chemicals, privacy of student records, maintaining student work permits, and maintaining attendance records. These types of measures "are general health and welfare measures," and so "have only an incidental relation to the instruction of private school children." *Id.* "They are related to educational instruction only in that by design and purpose they seek to provide for the physical health and safety of school children . . . ." *Id.* By allowing reimbursement for these general health and safety measures, the Legislature simply recognized that *all* children, regardless of whether they are attending a public school or a nonpublic one, should be equally protected by the law when they are playing on a school playground or eating lunch in a school cafeteria, or when a fire breaks out at the school. Indeed, Michigan's Constitution expressly requires equal treatment. Const 1963, art 1, § 2.

Keeping in mind its obligation to adopt a reasonable interpretation of § 2 that coincided with the common understanding of the provision, this Court in *Traverse City School District* "refused to adopt a strict 'no benefits, primary or incidental' rule" because it found "no evidence . . . that the people intended such a rule" when they adopted the terms "support" and "aid or maintain" in § 2. *Id.* at 413 (some internal quotation marks omitted; ellipsis in original). Instead, the Court concluded that the purpose behind the amendment (known at the time as Proposal C) was simply to prevent public money from being used to run parochial schools. As this

Court recognized in 1971, "[e]veryone agreed the proposed amendment was designed to halt parochiaid"—i.e., "state funding of purchased *educational* services in the nonpublic school"—"and would have that effect if adopted." *Id.* at 407 n 2 & 435 (emphasis added); *see also id.* at 407 n 2 ("As far as the voter was concerned, the result of all the pre-election talk and action concerning Proposal C was simply this—Proposal C was an anti-parochiaid amendment—no public monies to run parochial schools—and beyond that all else was utter and complete confusion."). The Court even recognized that no one would have understood § 2 to prohibit police officers or firefighters from providing aid or even being employed by the schools: "We do not read the prohibition against public expenditures to support the employment of persons at nonpublic schools to include policemen, firemen, nurses, counsellors and other persons engaged in governmental, health and general welfare activities." *Id.* at 420. "Since the employment stricture is a part of *the educational article of the constitution*, we construe it to mean employment for *educational purposes* only." *Id.* at 421 (emphasis added).

This Court followed its decision in *Traverse City School District* just four years later in *In re Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich 41 (1975). It reiterated that "the voters in adopting Proposal C were simply intent on outlawing parochiaid" and that it was not "adopt[ing] a strict 'no benefit, primary or incidental' rule." *Id.* at 48, quoting *Traverse City Sch Dist*, 384 Mich at 413. And it reaffirmed that "a reasonable construction" of the amendment's language concluded that "auxiliary services such as health care and remedial reading

programs could be provided to private schools consonant with the mandate of Proposal C [i.e., the second paragraph of § 2]." *In re Advisory Opinion re 1974 PA 242*, 394 Mich at 48. This Court reasoned that auxiliary services were "incidental services" that were "useful only to an otherwise viable school" and "not the type of services that flout the intent of the electorate expressed through Proposal C." *Id.* But the Court concluded that a statute that would have provided textbooks and supplies to private schools was barred by § 2, because textbooks and supplies were "essential" to "the educational process" (i.e., to instruction) and not merely incidental to a school's maintenance and support." *Id.* at 49.

In short, since § 2's second paragraph was first passed, this Court has continuously recognized the line between the forbidden funding of the educational process itself and the permissible funding of health, safety, and non-instructional matters. Here, 32 of the 44 mandates focus on auxiliary matters that fall well on the non-instructional side of the line because they "have only an incidental relation to the instruction of private school children"; they therefore are not prohibited by § 2. *Traverse City Sch Dist*, 384 Mich at 419 ("The prohibitions of Proposal C have no impact upon auxiliary services."); *In re Advisory Opinion re 1974 PA 242*, 394 Mich at 49 ("auxiliary services . . . could be provided to private schools consonant with the mandate of Proposal C").

C. Section 2 does not bar payment of non-instructional funds that incidentally support education.

Although the remaining 12 mandates relate to educational requirements, even these mandates relate only incidentally to instruction. For example, they set out background standards, such as requiring that teachers and counselors be certified (four of the mandates address certification), that students be informed under the Postsecondary Enrollment Act and the Career and Technical Preparation Act (another four of the mandates cover these acts), that school attendance be compulsory, that English be used as the primary language of instruction, and that school must notify schools district when they need auxiliary services. None of these mandates goes to tuition, for example, *see* Const 1963, art 8, § 2 (public funds may not "support the attendance of any student"), to paying teachers, *id.* (public funds may not "support . . . the employment of any person"), or to allowing private schools to choose the subjects to be taught, *Traverse City Sch Dist*, 384 Mich at 413–414 (recognizing the legally significant distinction between allowing a private school to choose the secular subjects to be taught and having the public school control that choice). In other words, these mandates also are permissible under this Court's reasoning in *Traverse City School District*, as these mandates too have only an incidental relation to instruction. 384 Mich at 423 (recognizing that even some measures identified as educational services, namely "non-instructional service, such as remedial reading and speech therapy," are general health and safety measures similar in nature to auxiliary services which we have found to be permissible under Proposal C").

The one requirement out of all 44 that comes the closest to reimbursement for actual instruction and therefore the closest to falling within § 2's prohibition on funding is the requirement that nonpublic schools teach a class on the U.S. and Michigan Constitutions and on government, as required by MCL 380.1166. But the plain language of § 152b makes clear that reimbursement related to this mandate is not intended to cover the teacher's salary, for example, or the cost of textbooks for the class. Section 152b states that the funds it allows reimbursement for "are noninstructional in character," MCL 388.1752b(7), and even includes language mirroring § 2 to further express the Legislature's intent that the funding would not aid instruction to students, MCL 388.1752b(8). Given this express directive by the Legislature, the reimbursement related to this government class must be understood to be limited to the *administrative* component of providing that class, not the *instructional* component.

And this distinction makes sense in the real-life context of providing auxiliary services. For example, under Rule 340.293 of the Michigan Administrative Code and MCL 380.1296, a nonpublic school may report its crossing guard needs and receive the needed services from the public school district using school aid funds. In contrast, a nonpublic school could not simply ask a local school district to provide administrative support for obtaining the criminal-history clearance of its personnel from the MSP, however ancillary and non-instructional the task. The latter places the cost of complying with the State's demands squarely

on the nonpublic school, even though the costs are as real as the tasks are mandatory—and necessary for the safety of all schoolchildren. See MCL 380.1230.

Moreover, the mechanisms for drawing the line between administrative costs and instructional costs are already in place in Michigan law. Public school districts in Michigan must file a detailed report of their financial expenditures to the Center for Educational Performance and Information, and their report must conform to a chart of accounts. MCL 388.1618(5). In this CEPI-required reporting, public schools must itemize expenditures "by allowable fund function and object." *Id.* This system requires public schools to break down expenditures into specific categories that separate instruction from other activities: the statute requires, at a minimum, "categories for *instruction*, pupil support, instructional staff support, general administration, school administration, business administration, transportation, facilities operation and maintenance, facilities acquisition, and debt service." *Id.* (emphasis added). Similarly, when the Legislature appropriates funds for a mandated activity, districts must budget for and account for their use in accordance with MCL 21.239, which states that "[f]unds received by a local unit of government"—which includes a school district, MCL 141.422d(4)(c)—"under this [Headlee implementing] act shall be separately accounted for to reflect the specific state requirement for which the funds are appropriated."

In fact, much like the nonpublic schools would for the required government classes set out in MCL 380.1166, public schools must itemize their use of funds awarded under a civic education grant under MCL 388.1699c. A civic education

grant under MCL 388.1699c covers the same type of course that § 152b covers for the government course mandated by MCL 380.1166. The civic education grant addresses "how to participate responsibly in local and state government," MCL 388.1699c; the mandated government class "stress[es] the rights and responsibilities of citizens," MCL 380.1166. The civic education grant covers a course "on the history and principles of United States constitutional democracy," MCL 388.1699c; the mandated government class covers "the constitution of the United States, in the constitution of Michigan, and in the history and present form of government of the United States, Michigan, and its political subdivisions," MCL 380.1166(1). And if public schools reporting on the civic education grant are capable of itemizing what money goes to "instruction," on the one hand, versus what money goes to "pupil support, instructional staff support, general administration, [or] school administration," on the other, MCL 388.1618(5), then there is no reason to think that nonpublic schools will have any difficulty applying the same distinctions.

It is worth noting that CEPI already collects data for nonpublic school personnel, indicating that the reporting is required under the school-safety provisions of MCL 380.1230, *et seq*. See CEPI, *Nonpublic School Personnel Report, Application User's Guide, Fall 2015*, http://www.michigan.gov/documents/cepi/NPSPR_User_Guide_Fall_15_498530_7.pdf. Although MCL 388.1752a provided more than $38 million to public schools to cover the cost of reporting information to CEPI, nothing defrayed these administrative costs to nonpublic schools until the passage of MCL 388.1752b. If CEPI can collect and retain personnel information

without running afoul of constitutional limitations against meddling with nonpublic-school instruction, then the Department of Education can draft a form under § 152b that limits any reimbursement claim to non-instructional services and prevents any repayment from violating the constitutional restrictions of § 2.

D. To avoid the constitutional problems concerning equal protection and free exercise that such a construction would raise, this Court should avoid adopting an interpretation of § 2 that would extend its prohibitions to neutral health and safety measures.

The Court should adhere to its interpretation in *Traverse City School District* and in *In re Advisory Opinion re 1974 PA 242* for an additional reason: interpreting § 2 broadly could create conflicts with the Equal Protection Clause or the Free Exercise Clause of the U.S. Constitution.

In *Traverse City School District*, this Court reasoned that adopting a "literal perspective" on § 2's "mandate of no public funds for nonpublic schools would place the state in a position where it discriminates against the class of nonpublic school children in violation of the equal protection provisions of the Fourteenth Amendment of the United States Constitution." 384 Mich at 430. Indeed, adopting an interpretation that bars funds for health and safety measures that exist separately from the actual provision of instruction or payment of tuition or teacher paychecks, could quite literally deny children the equal protection of the law: they would not be protected by the police and fire departments created by law, simply because they happened to be at a nonpublic school.

This Court in *Traverse City School District* also recognized that denying a child the protection of health and safety measures merely "because of his status as a nonpublic school student," when the child "attends a private school out of religious conviction," would raise serious concerns under the U.S. Constitution's religion clauses. 384 Mich at 433–34 ("When a private school student is denied participation in publicly funded shared time courses or auxiliary services offered at the public school because of his status as a nonpublic school student and he attends a private school out of religious conviction, he also has a burden imposed upon his right to freely exercise his religion.").

These concerns remain valid today. Indeed, the U.S. Supreme Court is hearing a case this upcoming term that relates to whether a state when it operates a neutral aid program must treat religious entities the same as it does secular entities; in fact, the neutral program at issue focuses on playground safety, just as one of the mandates here does. In *Trinity Lutheran Church of Columbia, Inc v Pauley*, the Eighth Circuit examined an environmental program that allowed entities to win a grant of funds to resurface playground equipment. 788 F3d 779, 781 (CA 8, 2015), cert gtd 136 S Ct 891 (2016). A church applied for a grant under the program, and despite ranking fifth out of 44 applications and despite the top 14 projects receiving grants, was denied participation in the playground safety program because the Missouri Constitution provided that " 'no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, section or denomination of religion.' " *Id.* at 782, quoting Missouri Const, art 1, § 7. The

Eighth Circuit held that "the Free Exercise Clause, the Establishment Clause, and the Equal Protection Clause" did not compel Missouri to allow churches to participate in the grant program. *Id.* at 784. The Supreme Court has granted certiorari to address "[w]hether the exclusion of churches from an otherwise neutral and secular aid program violates the Free Exercise and Equal Protection Clauses when the state has no valid Establishment Clause concern." Brief for Petitioner, *Trinity Lutheran Church of Columbia v Pauley* (No. 15-577).

Since applying § 152b does not raise Establishment Clause concerns (it applies equally to religious and secular nonpublic schools), this Court can avoid these thorny constitutional questions in the context of § 152b simply by continuing to construe § 2 in a reasonable way that recognizes that reimbursements for non-instructional services are not prohibited by § 2 at all. Nothing in § 2 prevents the Legislature from defraying the required costs of the non-instructional services it mandates, so this Court should find § 152b constitutional.

E. Principles of stare decisis counsel maintaining the interpretation of § 2 that has worked well for the past 45 years.

Given this Court's 1971 opinion in *Traverse City School District* and its further endorsement of that opinion in *In re Advisory Opinion re 1974 PA 242*, this Court is not writing on a blank slate. Accordingly, this Court should follow the principle of stare decisis, which " 'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.' " *Robinson*

v City of Detroit, 462 Mich 439, 463 (2000), quoting *Hohn v United States*, 524 US 236, 251 (1998). And while it is true that the second of these opinions (*In re Advisory Opinion re 1974 PA 242*) is an advisory opinion, and that advisory opinions are "not precedentially binding because advisory opinions are not precedent," *Appeal of Apportionment of Wayne Co, Co Bd of Com'rs-1982*, 413 Mich 224, 250 (1982), it is no less true that this Court's advisory opinions are understood by both state federal courts to state what Michigan law is. *E.g.*, *Council of Organizations & Others for Ed About Parochiaid, Inc v Governor*, 455 Mich 557, 569 (1997), citing *Traverse City Sch Dist*, 384 Mich 390; *Michigan State Chamber of Commerce v Austin*, 856 F2d 783, 786 (CA 6, 1988) (relying on an advisory opinion of this Court), *rev'd on other grounds sub nom. Austin v Michigan Chamber of Commerce*, 494 US 652 (1990). Further, stare decisis "is a 'principle of policy,' " *Robinson*, 462 Mich at 464, and the same policy reasons—evenhanded development of the law, reliance on judicial decisions, and integrity in the judicial process—apply with equal force to advisory opinions.

This Court's interpretation of § 2 has satisfied the guideposts of stare decisis: it has provided practical workability, the Legislature and others have relied on it, and no changes in the law have undermined it. As to workability, nonpublic schools in Michigan have for four and a half decades received health and safety services from public sources, including local school districts, police departments, and fire departments, without public outcry that this practice violates § 2. And the courts have not questioned its reasoning, let alone repeatedly. *Cf. Robinson*, 462 Mich at

466 (overruling an opinion in part because "the Court of Appeals has repeatedly questioned" it). As to reliance, parents who choose to have their children attend private schools have relied on the expectation that their children will still benefit from public safety services. Further, the Legislature has relied on this decision, including (1) by allocating money to private schools through MSP grants for schools safety initiatives, 2016 PA 268, art 16, § 901; (2), by allocating money to test for lead at nonpublic schools, 2016 PA 268, art 6, § 1102; and (3) by enacting this statute that so closely tracks the interpretation this Court announced in *Traverse City School District*. MCL 388.1752b(7) ("The funds appropriated under this section are for purposes related to education, are considered to be incidental to the operation of a nonpublic school, are noninstructional in character, and are intended for the public purpose of ensuring the health, safety, and welfare of the children in nonpublic schools and to reimburse nonpublic schools for costs described in this section."). And no changes to § 2—such as it being amended by the people as a rejection of this Court's interpretation, *cf. Chisholm v Georgia*, 2 US (Dall) 419 (1793) (spurring the adoption of the Eleventh Amendment)—or to other relevant law have undermined its reasoning.

CONCLUSION AND RELIEF REQUESTED

Nothing in Michigan's Constitution forbids the Legislature from reimbursing nonpublic schools for neutral, non-instructional measures that state law commands the nonpublic schools to take, because those measures relate to ensuring the health and safety of Michigan's children—*not* to funding their private instruction.

For these reasons, the Court should grant the Governor's request for an advisory opinion and should rule that § 152b does not violate article 8, § 2 of Michigan's Constitution.

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